UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	***)***	
	)	
Respondent	***)***	
	)	
v.	***)***	***Criminal Docket No. 91-72-P-H***
	)	***(Civil Docket No. 95-156-P-H)***
PATRICK W. TRACY,	***)***	
	)	
Petitioner	***)***	

RECOMMENDED DECISION ON PETITIONER'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

Petitioner Patrick W. Tracy moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Following a jury trial in this court, the petitioner was convicted on April 16, 1993 of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). On October 21, 1993 the court sentenced the petitioner to 312 months of incarceration, followed by five years of supervised release. On the petitioner's appeal of both his conviction and his sentence, the First Circuit affirmed. *United States v. Tracy*, 36 F.3d 187, 189 (1st Cir. 1994). The U.S. Supreme Court denied a petition for certiorari. *Tracy v. United States*, 131 L. Ed. 2d 576 (1995).

By his instant motion, filed *pro se*, the petitioner raises several contentions. First, he alleges ineffective assistance of counsel, in violation of his rights as secured by the Sixth Amendment, as the result of his trial counsel's having disclosed to a news reporter during the trial the fact that the petitioner had previously been adjudged not guilty by reason of insanity in another criminal proceeding. This fact appeared in two articles published in a local daily newspaper during the

petitioner's trial. The petitioner asks the court to find a constitutional deficiency both in the disclosure and in his trial counsel's subsequent decision not to ask the court to poll the jury to determine if any of the jurors had read the story in question. He also contends his trial counsel was ineffective by failing to object, based on Fed. R. Evid. 609(b), to the admission for impeachment purposes of a previous criminal felony conviction that was more than ten years old. Further, he contends that trial counsel was ineffective in his failure to subpoena a particular witness to testify at the sentencing hearing.

Second, the petitioner asks the court to vacate his conviction in light of certain remarks allegedly made by the trial judge to defense counsel during trial about the merits of the petitioner's case. Third, the petitioner contends that the court should vacate his conviction in light of the rule stated in *Petite v. United States*, 361 U.S. 529 (1960). Finally, the petitioner contends that he is entitled to relief here in light of the court's refusal at sentencing to depart from the Sentencing Guidelines in light of evidence the petitioner suffered from post-traumatic stress disorder. I recommend that the court deny the motion.

The petitioner has requested an evidentiary hearing. I conclude that no hearing is necessary.

> To dismiss a § 2255 motion without a hearing, the allegations set forth by the petitioner "must be accepted as true except to the extent they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact."

Myatt v. United States, 875 F.2d 8, 11 (1st Cir. 1989) (quoting *United States v. Mosquera*, 845 F.2d 1122, 1124 (1st Cir. 1988)). As explained below, even accepting the factual allegations of the petitioner as true, he is not entitled to the requested relief.

I. Ineffective Assistance of Counsel

The familiar test for determining when there has been ineffective assistance of counsel so as to require post-conviction relief was first articulated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. Although the *Strickland* court analyzed the performance prong first and the prejudice prong second,

> there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.

Id. at 697.

a. The Newspaper Articles

The petitioner first contends that his trial counsel was ineffective by failing to ask the court to poll the jury to determine if any jurors had read two potentially prejudicial articles that had been published during the trial in the local daily newspaper. Tracy had pleaded not guilty and not guilty only by reason of insanity and, at trial, presented evidence of his post-traumatic stress disorder ("PTSD") related to his service in Vietnam. *Tracy*, 36 F.3d at 188, 189-90. The two newspaper

articles in question revealed a fact not in evidence at trial: Six years previously, the petitioner had successfully used an insanity defense in connection with charges stemming from the 1986 holdup of a supermarket in Massachusetts.[1]

The record reflects that on April 14, 1993, which was the publication date of the first newspaper article and the second day of trial, the following colloquy occurred outside the presence of the jury as the court prepared to take its lunchtime recess:

> The Court: Before you go . . . , let me also point out, if you didn't observe there was an article in the paper this morning at Page 3-B concerning this trial.
>
> [Assistant U.S. Attorney Nicholas Gess]: I have read it, Your Honor.
>
> The Court: Have you seen it also, Mr. Beneman.
>
> [Defense Counsel David Beneman]: It was mentioned to me.
>
> The Court: I just want to make sure you're aware of it, you don't see any need for me to inquire of the jury concerning it.
>
> Mr. Beneman: No.
>
> The Court: Fine, you agree, Mr. Gess?
>
> Mr. Gess: The one thing, I don't know how this got out, does make mention of a prior insanity acquittal which is certainly not before the jury or anything public here, it causes me some concern as to how that got out. The fact of the matter is, I don't think there's any reason to call undue attention beyond the ordinary instruction that you give at the close of the day.
>
> The Court: Yes, I've given that already, will continue to.
>
> Mr. Gess: You've done it several times.

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[1] The two newspaper articles in question, and a third that was published following the trial, are appended to the petitioner's affidavit (Docket No. 67).

The Court: Unless there's a specific request that I question the jury about it, I won't.

Mr. Gess: I think it draws undue attention.

The Court: Fine.

Mr. Beneman: I agree.

Tr. 276-77. According to the petitioner, he subsequently learned from both his trial counsel and the reporter who wrote the articles that it was his own trial counsel who told the reporter about the previous insanity acquittal. Petitioner's affidavit at 2. The petitioner contends that this was a serious transgression by his trial attorney, and rather than reveal the misdeed to the court his counsel opted to forego polling the jury and thereby was sufficiently ineffective so as to violate the Sixth Amendment.[2]

Accepting the petitioner's factual contentions as true, and assuming he properly characterizes the disclosure of his previous acquittal as a misdeed, *see* Local Rule 40(a)(4) (prohibiting defense attorney from releasing information publicly during trial "if there is a reasonable likelihood that such dissemination will seriously interfere with a fair trial"), the conduct complained of fails to satisfy the first prong of the *Strickland* test. This prong requires a showing "that counsel's performance fell below an objective standard of reasonableness." *Matthews v. Rakiey*, 54 F.3d 908, 916 (1st Cir. 1995) (citations omitted). The reviewing court must "indulge a strong presumption that counsel's

[2] Implicit in the petitioner's argument is the contention that his trial counsel also erred in failing to request a jury poll following publication of the second prejudicial newspaper article. However, the second article is largely a repetition of the first and there is no suggestion of any different circumstances attending the subsequent publication. It is therefore reasonable to assume, as the petitioner apparently does, that the colloquy with the court about the first article was dispositive of any issues raised by the second.

conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged conduct `might be considered sound trial strategy.'" *Id*. (citations omitted).

In *United States v. Perrotta*, 553 F.2d 247 (1st Cir. 1977), the First Circuit held that when prejudicial publicity is brought to the court's attention, "the court must ascertain if any jurors who had been exposed to such publicity had read or heard the same." *Id*. at 250. The holding is taken verbatim from *Margoles v. United States*, 407 F.2d 727, 735 (7th Cir), *cert. denied*, 396 U.S. 833 (1969), a case relied upon by the petitioner. But the First Circuit was at pains to point out that "[t]he considerations will, of course, be altogether different where inquiry of the jury is not seasonably requested." *Perrotta*, 553 F.2d at 251 n.9 (citing *United States v. Beitscher*, 467 F.2d 269, 274 (10th Cir. 1972). And, *Beitscher*, in turn, was a direct appeal in which the defendant argued unsuccessfully that he had been deprived of a fair trial and effective assistance of counsel because his trial attorney objected successfully to the trial court's polling the jury in circumstances similar to those presented by the instant case. *Beitscher*, 467 F.2d at 274. The Tenth Circuit concluded that the trial court did not abuse its discretion in declining to poll the jurors in light of "the possibility that questioning the jurors would bring the matter to the attention of jurors who had not heard of [the newspaper article] and unnecessarily emphasize it to the jurors who may have been familiar with it." *Id.*

Nothing in the record of this case suggests that any of the jurors read the newspaper articles in question. The trial court specifically instructed jurors not to do so.[3] Jurors are presumed to follow

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[3] At the outset of the trial on April 13, 1995, the day before the first article appeared, the court admonished the jury as follows:

(continued...)

the court's instructions, at least in the absence of anything that suggests otherwise. *United States v. Boylan*, 898 F.2d 230, 263 (1st Cir.), *cert. denied*, 498 U.S. 849 (1990). Given this presumption, it was well within the realm of reasonable trial strategy for defense counsel to have opted not to ask the court to poll the jury. This is so even if, as alleged by the petitioner, his trial counsel was actually the source of the prejudicial information provided to the newspaper reporter. It is, after all, just as likely that the prejudicial information would influence a jury to accept the petitioner's insanity defense, knowing that another jury had already found the defendant not guilty of a crime in light of his PTSD.

The other cases cited by the petitioner are of no avail. In *Desmond v. United States*, 333 F.2d 378 (1st Cir. 1964), a section 2255 petitioner contended that he had failed to appeal the underlying criminal conviction because his trial counsel had falsely told him an appeal had been filed. *Id*. at 379-80. The First Circuit reversed the district court's summary dismissal, and with it the lower court's determination that the petitioner was required to show that appellate relief would have been futile. *Id*. at 381. There was no basis in *Desmond* for the court to conclude that the alleged deception by trial counsel was a reasonable exercise of trial strategy. *United States v. Hankish*, 502

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[3](...continued)

> Don't read or listen to anything about the case. If there should be something in the newspaper or on television just turn the page, change the channel, change the radio dial. You will be presented with all the evidence that's material to this case right here in the courtroom.

Partial tr. of proceedings, April 13, 1993, at 2-3. This admonition was repeated at the end of the second and third days of trial. *See* tr. at 410 ("Remember what I've told you before, if there's something in the newspaper, turn the page, don't read it.") and 573 ("Continue to be careful not to watch for anything on TV or the radio or newspaper and set it aside and ignore it.").

F.2d 71 (4th Cir. 1974), was a direct appeal in which the Fourth Circuit adopted the same rule articulated by the Seventh Circuit in *Margoles*, *i.e.*, that a trial court must ascertain the extent that a jury may have been exposed to prejudicial information when such a possibility is brought to the court's attention. *Id*. at 77. As noted above, this is also the law in the First Circuit. But *Hankish* does not speak to the question of when defense counsel might reasonably decline to invoke the principle articulated in *Margoles*. A closer case is *Government of the Virgin Islands v. Weatherwax*, 20 F.3d 572 (3d Cir. 1994), which bears some similarity to the instant case. In *Weatherwax*, the Third Circuit held that a petitioner was entitled to a post-conviction evidentiary hearing where his trial counsel had failed to request a jury voir dire to assess the impact of a prejudicial newspaper article that a juror had brought into the jury room. *Id*. at 573. The court reached two key conclusions: first, that the record was inconclusive on the question of whether trial counsel made a deliberate strategic decision, and, second, that counsel's failure to call the incident to the attention of the court fell below the standard of objective reasonableness articulated in *Strickland. Id*. at 579. Here, by contrast, the trial court made known its awareness of the newspaper article in question, and there was no evidence to suggest that any jurors had actually seen the article. Therefore, in contrast to *Weatherwax*, the petitioner's trial counsel here did not act in an objectively unreasonable manner.

Because I conclude that trial counsel's conduct, as alleged by the petitioner, does not fall below the objective standard of reasonableness described in *Strickland*, it is not necessary to reach the "prejudice" prong of the *Strickland* test. But, in light of the petitioner's contention that a conflict of interest existed between him and his trial counsel, an observation about prejudice is appropriate. The First Circuit has recently reemphasized that prejudice is presumed for purposes of the *Strickland* test if trial counsel "actively represented conflicting interests" and that such a conflict adversely

affected the attorney's performance. *Carey v. United States*, 50 F.3d 1097, 1100 (1st Cir. 1995) (citations omitted).

> To establish an actual conflict of interest, the defendant must show (1) the lawyer could have pursued a plausible alternative defense strategy or tactic, and (2) the alternative strategy or tactic was inherently in conflict with, or not undertaken, due to the attorney's other interests or loyalties.

Id. "[T]he defendant must demonstrate that the actual conflict is more than 'some attenuated hypothesis having little consequence to the adequacy of representation.'" *Id*. (citations omitted). It is true here that defense counsel could have opted to have the trial court query the jury on the prejudicial newspaper article. But the petitioner's theory -- that his trial counsel opted against such a request to cover the fact that he had disclosed the prejudicial information to the media -- is just the sort of attenuated hypothesis that is insufficient to establish prejudice *per se*. The trial counsel had no reason, other than his interest in gaining an acquittal for his client, to disclose information in the manner alleged by the petitioner. Thus, at best, it would be necessary for the petitioner to demonstrate "a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different" or that the result "was fundamentally unfair or unreliable." *Id*. at 1101 (citations omitted). It is difficult to imagine how the petitioner might make such a showing in the circumstances of this case, but it is a problem I do not confront.

b. Admission of the Previous Criminal Conviction

The petitioner next contends that his counsel was ineffective in his objection to the admission for impeachment purposes of evidence concerning the petitioner's previous conviction in Massachusetts state court for uttering a false prescription. The trial court admitted this evidence

over objection, a ruling that was affirmed on appeal. *Tracy*, 36 F.3d at 194. It is the petitioner's present contention that these rulings are premised on a significant error, *i.e.*, that he was convicted for this crime on September 24, 1984. *See id*. at 191 (noting date of conviction). According to the petitioner, he was actually convicted on September 25, 1979, received a sentence that was limited to a five-year period of probation, from which he was discharged without incarceration on the date mistakenly cited as the date of his conviction. Petition (Docket No. 65c) at 2. Although the petitioner concedes that he did not bring the mistake to the attention of the court or his attorney, attributing the lapse to medication he was taking during trial, he nonetheless seeks to lay the blame at the feet of trial counsel. According to the plaintiff, had the trial court known the actual date of conviction it would have excluded the evidence pursuant to Fed. R. Evid. 609(b).

Fed. R. Evid. 609 governs the admission of evidence, offered for impeachment purposes, of a witness's previous conviction of a crime. Subsection (b) provides in relevant part:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

As the petitioner notes, when a defendant receives a sentence of probation and is not confined, it is the date of the conviction that governs for purposes of Rule 609(b). *United States v. Lopez*, 979 F.2d 1024, 1033 (5th Cir. 1992), *cert. denied sub nom. Ramirez v. United States*, 124 L. Ed. 2d 258 (1993).

Nevertheless, and even assuming that the mistake about the date of the conviction is fairly attributable to the petitioner's trial counsel, the petitioner has not even begun to make the required

showing of prejudice. First, as the government points out, there is no basis for assuming that the court would not have concluded that the probative value of the evidence outweighed its prejudicial effect, thus permitting its admission pursuant to Rule 609(b).[4] And, secondly, the jury also heard evidence of two other criminal convictions, one in 1980 of armed assault with intent to rob a pharmacy and the other in 1987 of buying or receiving a stolen firearm or carrying a firearm in a vehicle. *Tracy*, 36 F.3d at 191. Therefore, evidence of the 1979 conviction was cumulative, at least insofar as the petitioner's criminal past reflected on his credibility at trial.

[4] I must, however, reject the government's contention that the First Circuit's opinion in the petitioner's direct appeal establishes that the trial court was without discretion to exclude this evidence regardless of the date of the conviction. What the First Circuit held was that the trial court lacked such discretion pursuant to Rule 609(a), which provides that evidence of crimes involving dishonesty or false statement shall be admitted regardless of the punishment but that evidence of convictions is otherwise subject to a discretionary ruling. *Tracy*, 36 F.3d at 192. Rule 609(a)(1). Rule 609(b), which by its terms is applicable to all convictions more than ten years old, requires a separate exercise of discretion and one that was not the subject of the First Circuit's opinion.

c. Failure to Subpoena Witness at Sentencing Hearing

Finally, the petitioner contends that his trial counsel was ineffective by failing to subpoena attorney Diane Hayes of Quincy, Massachusetts to testify at the sentencing hearing. The petitioner was sentenced pursuant to 18 U.S.C. § 924(e)(1), which provides for enhanced criminal sanctions in cases of criminal possession of a firearm when the defendant has three previous convictions for a violent felony or serious drug offense. In his direct appeal, the petitioner unsuccessfully challenged the admission for section 924 purposes of his 1979 conviction in Massachusetts state court on a charge of assault and battery on a police officer. *Tracy*, 36 F.3d at 196-98. His argument was that he had been unconstitutionally deprived of appointed counsel in connection with the previous conviction. *Id*. at 196. The trial court found that the petitioner had failed to show by a preponderance of the evidence that he had been denied his right to appointed counsel; the First Circuit found no error in that dispositive ruling. *Id*. at 197.

To support his contention, the petitioner submitted his own affidavit stating that he was not represented by counsel in connection with the assault and battery conviction. *Id*. at 196 n.9. He also offered an affidavit from Hayes, who stated that she was unable to locate a file on the petitioner in her records and therefore had "serious doubts" as to whether she had represented him. *Id*. at 197. Nevertheless, the state court's docket sheet suggested that Hayes was the petitioner's attorney of record at the time he entered a guilty plea simultaneously on the assault and battery charge and the false prescription charge described above. *Id*. The First Circuit took special note of the fact that Hayes did not deny in her affidavit that she had represented the petitioner, but stating only that she

lacked any the memory of it, and that she had no record of it (an absence she suggested could have been explained by a basement flood that disrupted her filing system). *Id*. at 198.

Now the petitioner contends that it was ineffective assistance of counsel for his attorney to have failed to subpoena Hayes because she would, upon being confronted by the petitioner in the courtroom, have had to testify truthfully that she had never represented him. This is unpersuasive. To accept the petitioner's argument would require the court to assume that Hayes was not truthful when she stated in her affidavit that she could not recall whether she had ever represented the petitioner. Absent a basis for making that assumption, the petitioner has not established the prejudice required by *Strickland* because there is no reason to suppose that Hayes's testimony would have led to a different finding on the matter at issue.

II. Trial Court Bias

The petitioner's next contention centers on his allegation that the judge who presided at his trial made certain remarks to his attorney that justify post-conviction relief. According to the petitioner, the trial judge stated that he was "not enamored" with the petitioner's insanity defense and then asked trial counsel, "Don't we have a plea on this case yet?" Petitioner's Memorandum (Docket No. 68) at 4. Presumably, these remarks came during the trial, although the petitioner does not contend they were uttered in the presence of the jury.[5]

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[5] As evidence of bias, the petitioner also cites the remarks made by the trial judge as he was imposing sentence. If anything, these remarks suggest that the judge had considerable sympathy for the defendant's plight as a veteran of combat. The court told the defendant,

> it's obvious that your experiences in Vietnam were terrible and have had a deep and lasting impact on you, and it's also obvious that you were a courageous and able

(continued...)

I am unable to agree with the government that *United States v. Rodriguez Rodriguez*, 929 F.2d 747 (1st Cir. 1991), supports the notion that the court should summarily reject the petitioner's contention of judicial bias given the lack of any credible evidence that the judge made the remarks in question. To the contrary, the First Circuit stressed in that case that a section 2255 motion can be dismissed without a hearing if the allegations "cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Id*. at 749-50 (citations omitted). Here, as in *Rodriguez Rodriguez*, the allegations relate to factual matters, are not inherently incredible and are outside the record. *Id*. at 750.

Nevertheless, dismissal without a hearing is appropriate on the petitioner's claim of judicial bias because the facts as he alleges them would not entitle him to any relief. *See id*. at 749 (noting that dismissal on that basis may be appropriate even when the factual allegations meet the test described in the previous paragraph). Under the statute requiring a judge to disqualify himself in light of a personal bias, the source of the bias must be extrinsic to the facts of the case. "Adverse attitudes toward a party or witness formed on the basis of the evidence before the court do not constitute disqualifying bias and prejudice." *In re Cooper*, 821 F.2d 833, 838 (1st Cir. 1987). That the trial judge agreed with the verdict ultimately returned by the jury is not a basis for post-conviction relief.

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[5](...continued)
soldier in Vietnam, and that like many Vietnam veterans, you were not properly treated when you returned home.

Sentencing tr. at 73. Nevertheless, the court observed that the petitioner is a "dangerous man" in light of his previous convictions, *id*. at 74, and that the petitioner was likely to continue committing criminal acts, *id*. at 75-76. All of these observations are firmly grounded in the record and therefore do not even slightly suggest the existence of improper judicial bias.

United States v. Cruz, 977 F.2d 732 (2d Cir. 1992), cited by the petitioner, is distinguishable. In *Cruz*, the Second Circuit vacated a sentence imposed in a case where the trial judge had explicitly threatened during jury selection to impose the maximum sentence in the event he concluded that the defendant went to trial without a "good defense." *Id*. at 734. Here there is no suggestion of such a threat or any other "unacceptable risk that the sentence was impermissibly enhanced above an otherwise appropriate sentencing norm to penalize the defendant for exercising his constitutional right to stand trial." *Id*.

III. *Petite v. United States*

The petitioner next contends that he is entitled to post-conviction relief in light of *Petite v. United States*, 361 U.S. 529 (1960), and his trial counsel's failure to invoke it in an effort to persuade the U.S. Attorney to forego the federal prosecution in light of related criminal proceedings in state court. *Petite* provides no basis for relief.

> The *Petite* policy and cases construing it stand only for the proposition that the government's motion to dismiss should be granted when it discovers that it is conducting separate prosecutions for the same offense. The doctrine does not create a corresponding right in the accused.

United States v. Booth, 673 F.2d 27, 30 (1st Cir.), *cert. denied*, 456 U.S. 978 (1982). To the extent that the petitioner's *Petite* argument is a species of his ineffective assistance of counsel claim, it is meritless. If *Petite* confers no rights on the petitioner, then his attorney's failure to cite *Petite* in pretrial discussions with the government did not cause prejudice within the meaning of *Strickland*.

IV. The Sentencing Guidelines

Finally, the petitioner cites *United States v. Cantu*, 12 F.3d 1506 (9th Cir. 1993), to contend that post-conviction relief is appropriate in light of the trial court's failure to depart downward from the guideline sentence in light of his PTSD. *Cantu* stands for the proposition that a sentencing court has the authority to make such a departure, *id*. at 1509, but says nothing about when such a departure is required.

To the extent that the petitioner now seeks to challenge the trial court's determination, that avenue is foreclosed in light of his failure to make such an argument in his direct appeal.[6] "A non-constitutional claim that could have been, but was not, raised on appeal, may not be asserted by collateral attack under § 2255 absent exceptional circumstances." *Knight v. United States*, 37 F.3d 769, 772 (1st Cir. 1994). The petitioner cites no such exceptional circumstances, nor am I otherwise aware of any.

[6] In his petition, the petitioner cites as his fourth ground for relief the trial court's "ignoring Sentencing Commission" and "not taking into account an extreme mitigating circumstance; i.e., severe Post Traumatic Stress Disorder." Petition (Docket No. 65b) at 2-3. In subsequent pleadings, the argument appears to metamorphose somewhat. In his memorandum, the petitioner suggests the trial court should have viewed the PTSD as a mitigating circumstance that had not been adequately taken into consideration by the United States Sentencing Commission in formulating the sentencing guidelines. Petitioner's Memorandum at 5. In his reply memorandum, the petitioner seeks to implicate his trial counsel, suggesting that his attorney had failed to make the proper argument pursuant to the Guidelines. Reply Memorandum (Docket No. 74) at 3. The former argument is insufficiently developed for me to make any determination based on an asserted flaw in the Guidelines themselves. The latter argument fails because the petitioner has failed to demonstrate any prejudice as required by *Strickland*.

V. Conclusion

For the foregoing reasons, I recommend that the petitioner's motion to vacate, set aside or correct his sentence be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 16th day of August, 1995.

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David M. Cohen
United States Magistrate Judge